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GADANG ENGINEERING (M) SDN BHD

v.

BLUWATER DEVELOPMENTS BHD

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HIGH COURT MALAYA, KUALA LUMPUR
PRASAD SANDOSHAM ABRAHAM JC
[SUIT NO: S-22-615-2009]
29 MARCH 2010

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ARBITRATION: *Stay of proceedings - Application - Dispute - Whether plaintiff's application for summary judgment should be heard first or defendant's application for a stay - Court has no discretion but to grant stay unless there is in fact no dispute between the parties on the matter agreed to be referred - Whether plaintiff's case fell under Arbitration Act 2005, s. 10(1)(b)- Dispute of fact on final account statements signed by defendant - Whether person signing statement on defendant's behalf was authorised to do so - Triable issues*

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The plaintiff in its affidavit averred that pursuant to two building contracts dated 31 December 2004, the defendant engaged the plaintiff to carry out and complete the construction of works under two packages, A and B. By final accounts statements for each package signed on or before 24 November 2008 by all parties, the plaintiff and the defendant agreed to the final accounts for both packages. Pursuant to this, by final certificates dated 24 November 2008, the architect appointed for the project certified the total value of works as RM158.5 million. As the defendant made interim payments of RM124.6 million under the contracts, RM33.9 million remained unpaid. The defendant filed encl. 17, being its application for a stay of proceedings pending reference to arbitration under s. 10 of the Arbitration Act 2005. The plaintiff filed encl. 18 being its application for summary judgment for RM33.9 million pursuant to the final accounts statements and final certificates for work done under the building contracts. The defendant alleged issues of defective and delayed works; certificates issued by the architect were not conclusive; the final accounts statements were not envisaged under the contracts; the final accounts statements only expressed the final claims of the plaintiff in respect of its works and the person who signed the final accounts statements on behalf of the defendant had resigned as a director of the defendant since 2 May 2008, as triable issues. The plaintiff maintained that as the

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defendant had agreed by signing the final accounts statements to fully and finally settle the account between them, including any and all claims which either party may have against each other, there was in fact no triable issue in this case. The preliminary issue was whether encl. 18 should be heard first or encl. 17.

Held (allowing the defendant's stay application and making no order on the plaintiff's summary judgement application):

(1) Under the new Arbitration Act, the court has no discretion but to grant a stay unless it comes under s. 10(1)(b) of the Act. Section 10 requires a stay of proceedings to be made unless s. 10(1)(b) applies to show that a stay should not be granted under the Act. The court must find that there is in fact no dispute between the parties on matters to be referred. This must be shown in answer to the application for stay itself, and not by way of a separate application for summary judgment. (para 5)

(2) Here the plaintiff contended that the final accounts statements signed by the defendant rendered the amounts stated therein undisputable bringing the alleged dispute within s. 10(1)(b) and encl. 18 should be allowed. The defendant disputed these statements in that they could not replace the already agreed mechanisms for final account under the contracts. There was undoubtedly a dispute of fact in addition to the defendant's contention that the person who signed these statements on behalf of the defendant had no authority to do so, these issues were triable. *Kirsch v. H.P. Brady PTY. Ltd. Commonwealth Law Reports* (refd). (para 8)

Case(s) referred to:
Halki Shipping Corp v. Sopex Oils Bhd [1998] 2 AFR 24 ***(refd)***
Hayter v. Nelson [1990] 2 Lloyd's Law Reports 265 ***(refd)***
Lee Brothers Construction Co v. Teh Teng Seng Realty Sdn Bhd [1987] LNS 125 ***(refd)***
Trans Resources Corpn Sdn Bhd v. Sanwell Corp & Anor [1999] 2 CLJ 988 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 6
Arbitration Act 2005, s. 10(1)(b), (2)
National Land Code, s. 256(3)
Rules of the High Court 1980, O. 14

For the plaintiff - T Kuhendran (Syed Haris with him); M/s Zulrafique & Partners
For the defendant - Conrad Young (PL Leong with him); M/s Sreenevasan Young

Reported by Susheila Sreedharan

JUDGMENT

Prasad Sandosham Abraham JC:

[1] Enclosure 17, was the application of the defendant for a stay of proceedings pending reference to arbitration under s. 10 of the Arbitration Act 2005 (the new Arbitration Act). Enclosure 18 was the application of the plaintiff for summary judgment under O. 14 of the Rules of the High Court 1980 for RM33.9 million pursuant to the final accounts statements and final certificates for work done under building contracts. I heard the matter and there after allowed encl. 17 on terms but made no order on encl. 18 and I append below my reasons for so doing.

[2] The question that first arose as a preliminary issue is whether encl. 18 should be heard first ie, the plaintiff's application for summary judgment or encl. 17, the defendant's application for a stay, and the position appears to be under the old Arbitration Act, that the application for stay should be considered first and only if a stay is not granted, then only should it proceed to hear the application for summary judgment but both applications should not be heard together (*Trans Resources Corp Sdn Bhd v. Sanwell Corp. & Anor* [1999] 2 CLJ 988).

[3] To appreciate the impact of the change of the law, I have reproduced s. 6 of the old Arbitration Act.

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, **if satisfied that there is no sufficient reason why the matter should not be referred in accordance**

with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, **may make an order staying the proceedings.**

[4] The new Arbitration Act is based on Unicitral's Model Law on International Commercial Arbitration. I set out s. 10 of the Arbitration Act 2005 and the differences between the old and new Arbitration Act will become immediately glaring.

10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration **unless** it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) **that there is in fact no dispute between the parties with regard to the matters to be referred.**

(2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[5] Under the new Arbitration Act, the court has no discretion but to grant a stay unless as the plaintiff sought to argue in the present case that it comes under s. 10(1)(b) of the new Arbitration Act. Looking at s. 10 of the new Arbitration Act as a whole in my judgment, s. 10 requires a stay of proceedings to be made unless s. 10(1)(b) applies to show that a stay should not be granted under the new Arbitration Act. The court must find that there is in fact no dispute between the parties on matters to be referred. This must be shown in answer to the application for stay itself, and not by way of a separate application for summary judgment. The wording of s. 10 of the new Arbitration Act is similar in wording to s. 256(3) of the National Land Code which is set out below:

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

[6] In light of that I would order an order in terms of encl. 17 unless there was in fact no dispute between the parties and for that purpose I would refer to the affidavit of the plaintiff in support of encl. 18 to determine whether the plaintiff's case falls under the exception to s. 10(1)(b) of the new Arbitration Act and unless the court is satisfied that there was in fact no dispute (s. 10(1)(b)) of the new Arbitration Act), an order in terms of encl. 17 would be granted. For this purpose the court made reference to the affidavit filed by the plaintiff in support of encl. 18 and directed counsel to submit accordingly. In this context the court refers to the case of *Hayter v. Nelson* [1990] 2 Lloyd's Law Reports p. 265 particular the judgement of Saville, J at p. 270-271 left hand column.

> The words inserted into the 1924 Act are, as a matter of pure construction, very difficult to understand. On their face the words appear to indicate that there can be a matter agreed to be referred even though there is not in fact any dispute between the parties – but as I have already pointed out, if there is in fact no dispute between the parties then there is very likely indeed to be nothing agreed to be referred since it is only a dispute (or differences) that the parties have agreed to refer. In the end I have concluded that this apparent absurdity can only be resolved by treating the word "dispute" in this context as indeed meaning something different from the word used in ordinary arbitration clauses, so that reading the phrase as a whole the words "there is not in fact any dispute" mean "there is not in fact anything disputable". To my mind this reading alone fits with the recommendation made by the committee and the fact that it was the problem identified by the Committee which Parliament, as it would appear, was intending to resolve when adding the phrase under consideration to the 1924 Act by the amendment made in 1930. There are to my mind no good grounds for suggesting that the words used in the 1975 Act were inserted for any different purpose; and accordingly it seems to me that the same meaning must be given to them.
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> In a number of cases the parties (and the Courts) have assumed that where a claimant seeks summary judgment and the respondent seeks a stay under s. 1 of the 1975 Act, the two applications are to be treated as the reverse sides of the same coin – see for example, *S.L. Sethia Liners Ltd v. State Trading Corporation of India Ltd.* [1986] 1 Lloyd's Rep. 31 at p. 33. However, in *Home and Overseas Insurance Co. Ltd v. Mentor Insurance Co. (U.K.) Ltd* [1989] 1 Lloyd's Rep. 473; the most recent authority drawn to my attention, Lord Justice Parker (with whom the other members of the Court of Appeal agreed) said this:

The purpose of O. 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the Plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But O. 14 proceedings should not in my view be allowed to become a means for obtaining in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on O. 14 applications points of law which may take hours or even days and the citation of many authorities before the Court is in a position to arrive at a final decision.

In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled *prima facie* to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the Courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.

In the case of a commercial arbitration the above remarks apply with even greater force, perhaps especially when the dispute turns on construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases that they have used, to judge what the parties at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract and to know what are the practices of the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but the Court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.

In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause, but, when a plaintiff seeks immediate judgment in other than a clear case and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might even fail to obtain leave to appeal or if he did obtain leave fail to demonstrate any error.

That case was concerned with an application for a stay under s. 5 of the Arbitration Act 1952, where of course the Court has a discretion, but to my mind the approach of the Court of Appeal must be at least equally if not more applicable to s. 1 of the 1975 Act, since in the latter case there is no discretion given to the Court at all. It seems to me to be clear from the passage quoted from Lord Justice Parker's judgment, that when considering an application for summary judgment, a factor to be taken into account is the existence of an arbitration agreement between the parties; so that only in the simplest and clearest cases ie, where it is readily and immediately demonstrable that the respondent has no good grounds at all for disputing the claim, should that party be deprived of his contractual right to arbitrate. In the context of the 1975 Act, this means that only in such cases can the Court be satisfied that there is not in fact any dispute between the parties with regard to the matter agreed to be referred.

The Plaintiff in its affidavit in support encl. 18A and submissions say this.

Brief Facts

1. Pursuant to 2 building contracts dated 31.12.2004, the Defendant engaged the Plaintiff to carry out and complete the construction of works under 2 packages, A and B. The conditions of contract were based on the PAM 1998 standard form with quantities.

2. By final account statements for each package signed on or before 24.11.2008 by all parties, the Plaintiff and the Defendant agreed to the final account for both packages.

3. Pursuant to this, by final certificates dated 24.11.2008, the architect appointed for the Project, certified the total value of works as RM158.5 million. As the Defendant made interim payments of RM124.6 million under the contracts, there is now a total of RM33.9 million remaining unpaid.

4. Based on affidavits filed by the Defendants, the Defendant has raised the following alleged triable issues.

   (i) Issues of defective and delayed works;

   (ii) Certificates issued by the architect are not conclusive;

   (iii) The final accounts statements are not envisaged under the contracts;

(iv) The final accounts statements only express the final claims of the Plaintiff's in respect of its works;

(v) Person who signed the final accounts statements on behalf of the Defendant had resigned as a director of the Defendant since 2.5.2008.

5. The Plaintiff's position is that the Defendant has agreed by signing the final account statements, on or before 24.11.2008, to fully and finally settle the account between themselves, including any and all claims which either party may have against each other, there is in fact no triable issue in this case.

6. Under the contracts, Package A was practically completed on 28.5.2007 whilst the last section in package B was completed on 15.11.2007. It should be noted that both packages had an 18 months defects liability period (DLP) which would have ended on 28.11.2008 and 15.5.2009 respectively. The final account statements were agreed and the final certificates were issued on 24.11.2008 even before the expiry of the DLP.

7. Throughout the project and after completion, the Defendant constantly failed to meet their payment obligations despite various demands made to them. In fact in March 2008, the Defendant offered to settle the amounts payable to the Plaintiff by way of contra units of properties. It should be noted that the final amounts payable for the project which was to be determined by the architect at that time was to take into account the total value of the works executed less, amongst others, all amounts to be deducted or withheld, liquidated damages and the value of works rejected or defective and neither party was to bring proceedings or make a claim against each other in respect of the amount payable. As the proposal was wholly uncommercial the Plaintiff did not agree to accept the same.

8. It should also be noted that in May 2008, the Defendant's Quantity Surveyor (QS) in a letter to the Defendant's project architect summarized the Defendants claims as liquidated damages of RM1.5m, defective works of RM7.1m and rejected works of RM2.1m (which were to be treated as defective works to be made good by the Plaintiff considering that the certificate of practical completion had been issued)

9. By final account statements (Exhibit GE-5A and 5B Affidavit Sokongan Enc. 18A @ pp. 84-101 and pp 1020119) for each package signed on or before 24.11.2008 by all parties (including the Defendant, the Defendant's OS that prepared it

A and the architect and the Plaintiff) The Plaintiff and the Defendant agreed to the final account for both packages. It should be noted that the statement includes items for claims submitted by the Plaintiff which the Defendant agreed to offset for part of compensation for the defective works and an item for defective works. Pursuant to this final certificate dated 24.11.2008.

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[7] In dealing with the above I am guided by the decision of the English Court of Appeal in *Halki Shipping Corp. v. Sopex Oils Bhd* [1998] 2 AFR p 24 where it was held:

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(Hirst LJ dissenting) Section 9 of the Arbitration Act 1996 introduced a significant restriction on the previous power of the court to exclude the RSC Ord. 14 jurisdiction by omitting the words in s. 1 of the Arbitration Act 1975 whereby the court could order a stay 'unless satisfied ... there is not in fact any dispute between the parties with regard to the matter agreed to be referred'. Accordingly, once the court was satisfied that there was a dispute under an arbitration agreement which governed the contract between the parties, it was not open to a plaintiff to bring Ord. 14 proceedings to enforce a claim to which the defendant had no arguable defence, and the court had to grant a stay unless it found the arbitration agreement to be null and void. In the instant case, there was a dispute which arose once the plaintiff claimed damages for breach of the charter party and therefore, until the defendant admitted that the sum was due and payable, the matter had to be referred to arbitration for determination.

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Referring to his Lordship's Henry LJ judgment.

Thus the speeches are based on the meaning of the word 'dispute' in the 1930 amendment rather than the meaning of the word in the arbitration clause.

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Similar considerations apply to the decision in *Ellis Mechanical Services Ltd v. Wates Construction Ltd* ([1978] 1 Lloyd's Rep 33. That case dealt with judgment at 268) said after his famous example of the argument over who won the University Boat Race:

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Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

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And the purpose of the 1930 amendment was the source of the restricted meaning of 'dispute': 'There is not in fact anything disputable'. Therefore, in the *Ellis* case, the court was in fact considering the words of the 1930 amendment. This can be further demonstrated by the consideration of that authority by the court in Associated *Bulk Carriers Ltd v. Koch Shipping Inc. The Fuohsan Maru* [1978] 2 All ER 254, which makes it clear that the conclusion that the sum found to be 'indisputably due' had been arrived at by the O. 14 decision of the court as being a sum as to which 'there is not in fact any dispute'. So that case is comparable with the *Nova* case in that the court there too reached its result by construction of the 1930 amendment.

What the words 'there is not in fact any dispute' meant in the 1930 amendment is now history, and no longer a relevant question to be asked. In my judgment Clarke J was right to follow the line of authority from *Tradax Internacional S v. Cerrahogullari TAS, The M Eregli* [1981] 3 All ER 344 to *Ellerine Bros (Pty) Ltd v. Klinger* [1982] 2 All ER 737, [1982] 1 WLR 1375, which focused on the meaning of dispute in the arbitration agreement. As he said in the report of this case at first instance [1997] 3 All ER 833 at 841-842, [1997] 1 WLR 1268 at 1277):

In the *Ellerine* case the Court of Appeal was also considering a question of construction of an arbitration agreement, in which it was agreed that all disputes or differences whatsoever should be referred to arbitration. The plaintiffs claimed an account. The Defendants had simply done nothing. The Court of Appeal expressly followed the decision in *The M Eregli* and held that silence did not mean consent and that, as Kerr J said, until the defendant admits that sum is due and payable there is a dispute within the meaning of the arbitration clause. Even in such a case, I can see an argument for saying that a claimant would be entitled to an award if the respondent then refused to pay. But, however that may be, the *Ellerine* case is authority for the proposition that where a party simply does nothing there is a dispute which the claimant is both entitled and bound to refer to arbitration. It follows that there is binding Court of Appeal authority in favour of the defendants' case on construction of the clause. It is true that the *Nova (Jersey) Knit* case was not directly referred to the Court of Appeal in that case, but it is expressly referred to by Kerr J in the *M Eregli* so that it cannot possibly be held that it was overlooked or that the *Ellerine* case was decided *per incuriam*. Both Kerr J and Saville J regarded the second point in the *Nova (Jersey) Knit* case as depending upon the meaning of the final words of s. 1(1) of the 1975 Act and not upon the true construction of the contract. It may well be that the

A Court of Appeal did the same. In these circumstance, the correct approach for a judge of first instance is to follow the reasoning of the Court of Appeal, so far as construction of the contract is concerned.

B I agree with that, and that decision is equally binding on this court. It follows that in my judgment Clarke J was right, and I would dismiss this appeal. By one of those quirks of the forensic process, Clarke J's judgment was not analysed in any depth at the hearing of this appeal. In studying it for the purpose of this judgment, I have come increasingly to admire it and to welcome its assistance in
C understanding a legal point deceptively simply to state, but one which I have found elusive.

[8] Here the plaintiff contends that the final account statements signed by the defendant renders the amounts stated therein undisputable ie, approx RM33.9 million taking the alleged dispute
D within of the sphere of s. 10(1)(b) and encl. 18 should be allowed. The defendant dispute these statements in that they cannot replace the already agreed mechanisms for final account in the said Agreement. There is most certainly a dispute of fact in addition to the contention that person who signed these statements on behalf
E of the defendant had no authority to do so, these issues are triable (See *Kirsch v. H.P. Brady Pty. Ltd. Commonwealth Law Reports* [1937] a decision of the High Court of Australia at p. 36).

[9] Section 10(1)(b) of the New Arbitration Act requires a higher
F standard to be satisfied then O. 14 of the Rules of the High Court and different criteria apply. The court is required to make a finding of fact that should be determined by the arbitrator. The position has been clearly illustrated by Saville in *Hayter Nelson* [1990] Vol. 2 Lloyd's Law Reports particularly at pp. 268 to 269 and I quote:

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> To the extent that such observations are intended to define what is or is not a dispute or difference within the meaning of an arbitration clause of the kind under consideration, I am respectfully unable to agree with them – more importantly they seem to me to be in conflict with the decision of the Court of Appeal in *Ellerine Brothers*
H *(Pty) Ltd. v. Klinger* [1982] 1 WLR 1375. In my view, to treat the word 'dispute' or the word "differences" in the context of an ordinary arbitration clause as bearing such a meaning leads not only to absurdity, but also involves giving those words a meaning which (though doubtless one the words are capable of bearing) in context
I is difficult to support.

The proposition must be that if a claim is indisputable then it cannot form the subject of a "dispute" or "difference" within the meaning of an arbitration clause. If this is so, then it must follow that a claimant cannot refer an indisputable claim to arbitration under such a clause; and that an arbitrator purporting to make an award in favour of a claimant advancing an indisputable claim would have no jurisdiction to do so. It must further follow that a claim to which there is an indisputably good defence cannot be validly referred to arbitration since, on the same reasoning, there would again be no issue or difference referable to arbitration. To my mind such propositions have only to be stated to be rejected – as indeed they were rejected by Mr. Justice Kerr (as he then was) in *The M. Eregli* [1981] 2 Lloyd's Rep. 169, in terms approved by Lords Justices Templeman and Fox in *Ellerine v. Klinger* (sup.) As Lord Justice Templeman put it (at p. 1383):

There is a dispute until the defendant admits that the sum is due and payable.

In my judgment in this context neither the word "disputes" nor the word "differences" is confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Beat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them.

In my view this ordinary meaning of the word "dispute" or the word "differences" should be given to those words in arbitration clauses. It is sometimes suggested that since arbitrations provide great scope for a defendant to delay paying sums which are indisputably due, the Court should endeavour to avoid that consequence by construing these words in arbitration clauses so as to exclude all such cases, but to my mind there are at least three answers to such suggestions.

In the first place the assumption is made that arbitrations are necessarily slow processes, but whatever the position in the past, I cannot accept that as a general or universal truth today. As Mr. Justice Robert Goff (as he then was) pointed out in *The Kostas Melas* [1981] 1 Lloyd's Rep. 18, arbitrators have ways and means (in

particular by making interim awards) of proceeding as quickly as the Courts – indeed in that particular case quicker than any Court could have acted. If a claimant can persuade the arbitral tribunal that in truth there is no defence to his claim (*ex hypothesi* not on the face of it a difficult task if the claim is truly indisputable) then there is no good reason why that tribunal cannot resolve the dispute in his favour without any delay at all.

In the second place, and perhaps more importantly, it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes should be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains – and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.

In the third place, if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator's very function is to decide whether or not there is a good defence to the claimant's claims – in other words, whether or not the claim is in truth indisputable. Again, to my mind, whatever the position in the past, when the Courts tended to view arbitration clauses as tending to oust their jurisdiction, the modern view (in line with the basic principles of the English law of freedom of contract and indeed International Conventions) is that there is no good reason why the courts should strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them.

For these reasons I am satisfied that the present proceedings are in (respect of a matter agreed by the parties) to be referred within the meaning of s. 1(1) of the Arbitration Act, 1975. A difference exists between them in respect of their rights and obligations arising out of the agreement to which the arbitration clause refers.

[10] I also refer to *Lee Brothers Construction Co. v. Teh Teng Seng Realty Sdn Bhd* [1987] 1 LNS 125; [1987] 1 MLJ 459 which deals with the old Arbitration Act but way of analogy, I make reference to the dictum of Peh Swee Chin J p 461 para B right hand column "I in my view short of an admission of liability, a dispute has already arisen in this case". For these reasons, I allowed encl. 17 and made no order on encl. 18.

[11] Counsel then urged me to consider the provisions of s. 10(2) of the New Arbitration Act. That particular section confers wide powers on the court to make the appropriate orders as it deems fit. I accordingly ordered that the arbitration proceedings be completed within one year failing which the plaintiff be at liberty to revisit encl. 18.

[12] As a postscript the court is grateful to all counsel for their submissions especially in this unchartered area of the law as far as Malaysia is concerned where there appears to be no direct authority on point.

[13] I made the following orders:

(i) Enclosure 17 is allowed on terms that the arbitration for which this matter will be referred to must be completed within one year failing which the plaintiff be at liberty to proceed to court under encl. 18 for summary judgment on the said sum of RM33.9 million.

(ii) No order on encl. 18.

(iii) Costs of both applications be reserved to the arbitration and/or arbitrator to be appointed.